# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1978

**No. 78-1005**

HAROLD R. BROWN, SECRETARY OF DEFENSE, Et Al.,
*Petitioners*

VS.

WAYNE M. ALLEN, Et Al.
*Respondents*

HAROLD R. BROWN, SECRETARY OF DEFENSE, Et Al.,
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VS.

GEORGE T. MOSES, Et Al.
*Respondents*

## OPPOSITION TO PETITION FOR CERTIORARI

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### REASONS FOR DENYING THE WRIT

The courts below enjoined the Department of Defense from requiring prior approval of the content of petitions to Congress circulated by servicemen in non-combat zones. The plaintiffs had been refused permission to circulate because their respective commanders found the petitions to present danger to "loyalty, discipline or morale". On close examination the courts below found that the commanders' actions conflicted with 10 U.S.C. § 1034 and with the First Amendment. The Solicitor General has petitioned for certiorari.

The Solicitor General's Petition for Certiorari offered no reasons for granting the writ. Rather, the Solicitor Gen-

eral asked only that this Court defer action on the petition until the Court rules on the petition for certiorari in *Secretary of the Navy, et al. v. Private Frank L. Huff, et al.*, No. 78-599. We file this response at the request of the Clerk of Court and we assume that the reasons on which the government relies in its motion in this case are the same as those upon which it relies in *Huff*. We agree with the implication of the government's petitions in this case, in *Huff*, and in *Harold R. Brown, et al. v. Albert Edward Glines*, No. 78-1006 that the cases present substantially similar issues of law.

Respondents' Opposition in *Huff* and the decisions of the various courts of appeal and district courts in the three cases before this Court amply demonstrate the correctness of the decisions below as a matter of law and we will not repeat those arguments here. See, *Allen v. Monger*, 583 F.2d 438 (9th Cir. 1978); *Allen v. Monger*, 404 F.Supp. 1081 (N.D.Cal. 1975); *Huff v. Secretary of the Navy*, 188 U.S. App. D.C. 26, 575 F.2d 907 (1978); *Huff v. Secretary of the Navy*, 413 F.Supp. 863 (D.C. 1976); *Glines v. Wade*, 586 F.2d 675 (9th Cir. 1978); *Glines v. Wade*, 401 F.Supp. 127 (N.D. Cal. 1975); *see also, Carlson v. Schlesinger*, 167 U.S. App. D.C. 325, 511 F.2d 1327 (D.C. Cir. 1975) (restrictions permitted in combat zone).

We do feel compelled to note the obvious: there is no conflict among the circuit courts on this issue and indeed no conflict among the district courts. All are agreed that prior restraints on circulation of petitions to members of Congress in non-combat zones is prohibited, if not by the explicit terms of 10 U.S.C. § 1034, then by the First Amendment. The issue can hardly be as difficult as the Solicitor General would have us believe. We concede that if this Court grants the petition in *Huff* it should also grant the petition in the instant case. For the reasons set forth below, however, we believe that the procedural posture and the



facts of the instant case offer compelling support for the lower court decisions in all of the cases.

**1. The Department of Defense Has Operated for Three and Half Years Without Seeking Relief From the District Court's Injunction.**

The Solicitor General states in the *Huff* petition that "some form of prior review by command personnel of proposals to circulate petitions on military bases is essential to the discipline, readiness and morale of the armed forces, and is thus necessary to the security of the nation." *Huff*, Petition for Writ of Certiorari at 9. The procedural posture of this and the other cases suggests that the assertion is suspect at best and disingenuous at worst. On July 11, 1975 after hearing a total of three days of testimony, actually visiting an aircraft carrier at the request of the government (See Clerk's Transcript at 183), and considering additional deposition testimony of five witnesses, the trial court issued its injunction. *Allen v. Monger*, 404 F.Supp. 1081 (1975) (See also C.T. at 298-301). The government neither sought a stay of that injunction in the district court nor did it seek immediate relief in the Ninth Circuit. (The government did move to expedite the appeal. That motion was denied on September 20, 1976 and the government took no further steps.) On October 4, 1978 the Ninth Circuit rendered its decision affirming in all respects the District Court decision. *Allen v. Monger*, 583 F.2d 438 (1978). The government made no request for a stay, nor did it seek immediate relief in this Court. Thus for more than three and one half years the Department of Defense has been under an order prohibiting the imposition of any prior restraint on the circulation of petitions by servicemen on military bases in non-combat zones. Nowhere below and nowhere in the petition for certiorari has the government shown the precise nature of the order's effect on discipline, readiness or morale, nor has it suggested anywhere but in

these proceedings that the security of the nation has been in danger for the past three and one half years.

**2. Permission to Circulate the USS HANCOCK Petition Was Denied Solely Because the Petition Was Intended for Members of Congress.**

The commanders below found that the petitions presented "a clear danger to the loyalty, discipline or morale" of the troops under their command. See, Findings of Fact, ¶ 28, 404 F.Supp. at 1086. That is strong language indeed. It is therefore appropriate at the outset to provide the text of the offending documents. The petition sought to be circulated on the USS HANCOCK read as follows:

> Dear Congressman Stark,
>
> We, the undersigned crew members of the U.S.S. HANCOCK, in recognition of the fact that the United States is officially no longer at war with the countries of Indo-China, and because the HANCOCK has already been in commission for 29 years, respectfully request that you ask Congress to investigate the necessity of having the HANCOCK make another West Pacific cruise.

The MIDWAY petition is somewhat longer but presents approximately the same danger to the military:

> We, the crew and families of the U.S.S. MIDWAY, do hereby exercise our right as citizens of the United States of America to petition Congress on the following issue. We object to and are demoralized by the homeporting in Yokosuka, Japan, of the U.S.S. MIDWAY for the following reasons:
>
> (1) We are freely opposed to the excessive expansion and imposition of United States military forces overseas. Homeporting the MIDWAY in Yokosuka is another attempt by the U.S. to permanently establish its military presence in Asia.



> (2) We object to the false statements made by the military that there is an *all volunteer* crew to deploy to Yokosuka.
>
> (3) We disapprove of the governments [sic] lack of preparations in providing housing and other living accomadations [sic] to support our full complement of crew and families.
>
> (4) It is the right of all military personnel as citizen-soldiers of the U.S. to practice individually or collectively their rights as citizens, namely, (a) the right of free speech, (b) the right to peacefully assemble, (c) freedom of the press, and (d) the right to petition Congress.

What was it about these petitions that led two experienced naval officers to conclude that they were a clear danger to the loyalty, discipline or morale of their subordinates? Apparently, only that *Congress* would get the very information contemplated by 10 U.S.C. § 1034. On cross-examination the former captain of the USS HANCOCK testified that he would have permitted distribution of the material in the petition had it been anything other than a petition to Congress:

> Q. Everything in this petition, if that information were in the New York Times, you would have no problem with its distribution?
>
> A. No.
>
> Q. If someone clipped that article out of the New York Times you would have no problem with its distribution? In fact, that goes on quite often?
>
> A. No.
>
> Q. If somebody—please forget copyright laws—distributed that information to people on board ship, would you have any problem with that, on a leaflet?
>
> A. Probably not, unless they asked for a signature.

Q. Unless they asked for a signature. So what we are—what we are really getting at then is—is a question of asking for a signature, that is, the fact that it is a petition is what gave you the difficulty?

A. They are asking for support in the form of a signature.

Q. It was your understanding, was it not, that those signatures on that petition were ultimately to be transmitted to a member of Congress; was that your understanding?

A. I believe that was in the request, and that's certainly what the petition is addressed to, a Congressman. That was an assumption, I believe, I made at the time.

Testimony of Admiral (formerly Captain) A. J. Monger, Reporter's Transcript at 156. *See,* Findings of Fact, ¶ 33-35, 404 F.Supp. at 1086-1087.

It appears as if the only danger to morale in question was the danger to the captain's morale.

The facts so well illustrated by the HANCOCK captain's testimony present a situation precisely the reverse of *Greer v. Spock*, 424 U.S. 828 (1976), on which the government relies so heavily. In *Spock* the Court upheld a prohibition against civilian political campaign leafletting on a restricted military training base in order "to [keep] the military separate from political affairs" and in order to enforce the "express provision for civilian control of the military in Art. II, § 2 of the Constitution." 424 U.S. at 841. (Burger, C.J., concurring). The thrust of *Spock* was, in the majority words of Mr. Justice Stewart, to maintain the "American constitutional tradition of a politically neutral military establishment *under civilian control.*" 424 U.S. at 839 (emphasis added). It is precisely that tradition which the First Amendment and 10 U.S.C. § 1034 are designed to



protect and it is precisely that tradition which Captain Monger tried to subvert under the guise of national security.

The refusal of the MIDWAY'S captain to permit circulation of the MIDWAY petition further illustrates the very arbitrariness which flourishes where prior restraint is permitted. Admiral Foley testified in deposition that the petition presented no danger to loyalty or to discipline, a position he backed off from at trial. See, R.T. 111-13. He questioned the petition's truthfulness. (R.T. 130-31), although he admitted he had the means to rebut untruthful statements (R.T. 120). He said the petition would cause "inconvenience" to the crew. (R.T. 117-18). And he admitted that the petition in no way urged refusal of orders. (R.T. 108) His undifferentiated fear of the written word cannot support abrogation of the right to petition Congress.

### 3. The Trial Court's Findings and Conclusions Are Consistent With the Expressed Needs of the Military.

The court recognized that a military commander may reasonably regulate the "time, place and manner" of speech. *Cox v. Louisiana,* 379 U.S. 559 (1965). It recognized, however, that there is a difference between absolute prohibition and reasonable regulation. It sought the aid of Admiral Monger (formerly the HANCOCK's captain) in determining the permissible level of time, place and manner regulation. The final order encompasses almost exactly what Admiral Monger testified would be a reasonable basis for circulating petitions generally on board ship if they were to be allowed at all:

Q. . . . what I am trying to do is pin down the areas where you would not want it circulated.

A. I think any berthing space, any working space, and certainly the mess decks. Our mess decks were

smaller in proportion to the crew than most any other ship.

Q. Beyond those places are there any other places where it would disrupt the function of the ship to have petitions circulated?

A. There aren't very many places left, very frankly.

R.T. 147-48.

The district court ordered the following:

> Defendants may prohibit the distribution of petitions in work areas while persons are on duty in such areas. Defendants may prohibit the circulation of petitions by persons on duty or to persons on duty. For purposes of this Order the phrase 'on duty' is intended to mean actually at work or at a working station and does not include persons who may be required to report for duty on short notice or those on standby duty. Defendants may also prohibit the distribution of petitions in sleeping areas other than those of the circulator. Defendants may also prohibit the distribution of petitions at the mess hall during meals. Finally, defendants may forbid the circulation of petitions by superior officers in such a manner that subordinates may feel coerced into signing such a petition.

404 F.Supp. at 1090.

This was no broadside swipe at the military justice system. The decision below was in this and all other respects a considered effort to accommodate competing interests. It was made with full consideration for the views of the military personnel who now petition this Court and it accommodated those views to the demands of Congress and the First Amendment. In doing so it anticipated this Court's concern—as expressed in *Greer v. Spock*—that civilians maintain control over the military. That control



is subverted when commanders may cut off the effective flow of information from enlisted persons to Congress.

## CONCLUSION

For the aforementioned reasons the petitions for a writ of certiorari in this case and in *Huff* and *Glines* should be denied.

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